82-1480

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

1983 TERM

DAVID KLINE

Petitioner,

Versus

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

ELLIS & ELLIS
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Counsel for Petitioner

David Kline, a citizen of the State of Louisiana and of the United States, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Louisiana on December 1, 1962, affirming the conviction and sentence of your petitioner in a criminal case.

Questions Presented for Review

(1) Can a peace officer conduct a search and seizure of a local citizen's vehicle based on a three day old tip from an informant without first obtaining a search warrant from either of two resident judges?

(2) Is it an unlawful intrusion upon a party's right to be free from governmental interference when a peace officer in a clearly marked police car awaits the return from work of a local truck driver at 3:00 A.M. and then

effects a warrantless search of his vehicle?

(3) Does the mere observation of a gun case in a local citizen's stopped vehicle constitute a "plain view" exception to the warrant requirement, absent exigent circumstances?

List of Parties to Proceeding

David Kline - Petitioner

State of Louisiana - Prosecuting authority and Respondent

Honorable Lowen B. Loftin, District Attorney in and for the Fifth District Court, State of Louisiana, Parish of Franklin

Honorable E. R. McIntyre, Jr., Assistant District Attorney in the above district.

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TABLE OF AUTHORITIES

Statutory

Cases

Official Report of the Case

The Memorandum Decision of the Louisiana Supreme Court affirming petitioner's conviction sought to be reviewed herein is reported at Vol. 424, Southern Reporter (2nd) #82-KA-0858, the Application for Rehearing having been denied on January 7, 1983 (One Dissent).

Grounds on which Jurisdiction of United States Supreme Court Invoked

The Louisiana Supreme Court affirmed the conviction of the defendant of the offense of "Possession of a Firearm after a Prior Conviction of Simple Burglary" by way of Memorandum Decision entered December 1, 1982. An Application for Rehearing was timely filed and was denied on January 7, 1983, followed by a 60 day Stay Order of Execution rendered January 17, 1983. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Sec. 1257 (3) and 28 U.S.C. Sec. 2101.

Constitutional Provisions Involved

The principal consitutional provision involved in this case is the Fourth Amendment to the United States Constitution requiring a warrant based on probable cause for the search and seizure of a person's belongings.

Statement of the Case

This case involves a warrantless arrest of the defendant and a warrantless search of his vehicle and seizure of an encased firearm, after the vehicle was stopped by a peace officer at 3:00 A.M. in the morning. The warrantless action taken by the peace officer was based upon a tip received some three days previously by an informant to the effect that the defendant carried a firearm in his truck when returning home after work in the wee hours of the morning.

For some time prior to January 9, 1981, the defendant, David Kline was employed by Thompson Trucking Company of Winnsboro, Louisiana as a driver of a transport truck. His driving routes for his employer originated from the Town of Winnsboro to various points of delivery and pickup of cargo material in various towns and cities of Northeast Louisiana and adjoining States and then return to Winnsboro. His invariable sechedule, or routine, was to depart from Winnsboro at 2:00 in the afternoon and return to Winnsboro around 3:00 or 3:30 o'clock the following morning. Deputy Sheriff Larry Crum was completely familiar with the defendant's daily work routine, as the following excerpt from his testimony on cross-examination demonstrates:

Q. You knew he worked for W. B. Thompson and drove a transport truck?

A. Yes Sir.

Q. And that he made daily trips from Winnsboro to other places and would return early in the morning hours, you knew that didn't you?

A. Yes Sir, I did.
(See Transcript, Pages 24-25)

At about 3:00 o'clock A.M. on the morning of January 9, 1981, the defendant returned to Winnsboro in his employer's transport truck and parked it in the parking area provided for the vehicle. He then got into his own pickup truck and started driving toward his home a few miles North of Winnsboro. Deputy Crum was in his official car parked on the street a short distance away, where he had been waiting for some time. When the defendant drove by, Deputy Crum drove his car in behind the defendant's truck and after following for some little distance, the defendant pulled over and stopped his truck and Deputy Crum did the same. Deputy Crum then looked in the cab of defendant's truck and saw a

"black case" that he "recognized as a pistol case". Upon being asked about it, the defendant stated that his pistol was in the case. Deputy Crum then removed the case from the vehicle, unzipped it and found a "long barrel revolver" therein which he retrieved and kept. Deputy Crum then arrested the defendant for Possession of a Firearm while on probation for a previous offense and advised him of his rights.

At the time of stopping of defendant's truck by Deputy Crum and his retrieval of the pistol from the cab thereof, there was no warrant for the search and seizure of evidence from the defendant's truck in the manner set out hereinabove. The alleged basis for the search, seizure and arrest was information Deputy Crum testified he had received from a confidential informant. However, he admitted that this information had been given to

him about THREE DAYS PRIOR TO HIS SEARCH AND SEIZURE OF DEFENDANT'S TRUCK. The following excerpt from Dy. Crum's testimony at the hearing on the Motion to Suppress (on cross-examination) establishes his prior knowledge as well as his weak explanation of no prior action thereon:

> Q. But the information you had which led to your staking out and waiting for Mr. Kline, you had a full three days ahead of time, from the time that you did actually stop him and actually make the search and seizure, whether he stoped because of you or whether you stopped him?
>
> A. Yes Sir.
>
> Q. There are two Judges here in Winnsboro authorized to execute warrants, so it wasn't a matter of having to execute a warrant that night, you had the information you felt you needed to give you probable cause three days ahead of this search and seizure, did you not?
>
> A. As I stated earlier, I didn't intend to stop or search him, I was just looking to see how he was. I hadn't seen Mr. Kline in several days. I parked there to see what his actions were as he left work. (See Transcript, Page 26) (Comment: AT 3:00 O'CLOCK IN THE MORNING?!)

After his arrest, the defendant was eventually charged by Bill of Information filed on June 12, 1981 with the offense of Possession of a Firearm after having been convicted of Burglary on October 20, 1980, a felony in the State of Louisiana, as per Revised Statutes 14:95.1.

Prior to trial, defendant, through undersigned counsel, timely filed a Motion to Suppress evidence based upon the warrantless stopping and searching of the truck in which he was riding as set out hereinabove. This Motion to Suppress was tried on Novmeber 25, 1981, with testimony put on by the State (which admittedly has the burden of proof) being recorded and later transcribed as the Note of Evidence in this case. The trial judge overruled the Motion to Suppress, to which ruling the defendant noted an objection.

On February 19, 1982, the State moved that the Bill of Information previously filed be amended to "Attempted Possession of a Firearm by a Convicted Felon". The defendant, through counsel, then withdrew his former plea of Not Guilty and entered a plea of Guilty to the reduced charge, with the reservation of the right to appeal the adverse ruling of the Court on the Motion to Suppress, as permitted by the rule of State vs. Crosby, 338 So. (2d) 584 (1976). Then the Court sentenced the defendant to one and one-half years at hard labor under the supervision of the Department of Corrections. An appeal to the Louisiana Supreme Court was taken by defendant and timely filed therein. Included in the record of that appeal was an Assignment of Error filed by counsel for the defendant based upon the trial judge's overruling of defendant's Motion to Suppress prior to trial.

ARGUMENT

May It Please The Court:

As set out in the Statement of the Case hereinabove, this case presents the question of the validity of a warrantless search of a person's vehicle based upon a tip from an informant received three (3) days earlier. By his own admission, the peace officer in question was completely familiar with the defendant's daily work routine, and he was also well aware that there were two district judges residing in the small town of Winnsboro available for obtaining the required search warrant. Yet he gave no explanation for his failure to obtain a warrant.

Since defendant's conviction was affirmed by Memorandum decision, we have no written opinion of the Louisiana Supreme Court from which to deduce any basis for the Court's excusing the obtaining of a warrant. From the Briefs filed by the

Prosecution, it was contended that the automobile exception to the warrant requirement applied to the case and that the "plain view" doctrine also applied. We submit that neither of these are applicable to this case and that the Louisiana Supreme Court erred in failing to reverse the lower court's ruling on defendant's Motion to Suppress.

The Automobile Exception
- The "Carroll" Doctrine

This Exception harks back to Carroll vs. U.S., 267 U.S. 132, 45 S.Ct. 280 (1925) where officers having probable cause made a warrantless search of a car on a public highway which yielded contraband liquor. This narrow exception to the warrant requirement has been interpreted and embellished by numerous decisions of this Honorable Court. Not only must there exist probable cause on the part of the arresting officers, but exigent

circumstances must also be present in order for this automobile exception to be invoked. In Carroll, the basis for the creation of the exception was shown by the following reasoning of the Court:

> ". . . . . .there is a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." See 267 U.S. 132, 153, 45 S.Ct. 280, 285.

Demonstrating the continuation of the exception over the years, the following excerpt is taken from Your Honors decision in Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971):

> "As we said in Chambers, supra, ...'exigent circumstances' justified the warrantless search of 'an automobile stopped on the highway' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may

never be found again if a warrant must be obtained.. . . . . .the opportunity to search is fleeting' (Chambers vs. Maroney, 399 U.S. 42, 990 S.Ct. 1975)."

This is not a case in which the automobile exception applies in any sense of the word. We are dealing here with "home folks" in a small town, each well known to the other. Deputy Crum was completely familiar with defendant's working routine, as he admitted, and yet failed to obtain a warrant although he had ample time and opportunity to do so. The following excerpt from this Honorable Court's Opinion in Coolidge is extremely apropos:

"(13) The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Caroll vs. United States - no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband, no stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detailed to guard the mobilized automobile. In short, by no possible stretch of the

> legal imagination can this be made into a case where 'it is not practicable to secure a warrant' . . . . . .'and the automobile exception', despite its label, is simply irrelevant." See 403 U.S. 493, _____, 91 S.Ct. 2022, 2035-2036.

Undersigned counsel is aware of Your Honors' recent decision in United States vs. Ross, 102 S.Ct. 2157 (1982) where the "automobile exception" was extended to include the right to search containers found in an automobile legitimately stopped by peace officers under the Carroll Doctrine. However, in our appreciation, Ross does not apply to a case in which the "automobile exception" is entirely absent, as in Coolidge and as in the instant case.

The "Plain View" Doctrine

The prosecution contends that this case presents a factual situation for the application of the 'plain view" doctrine, or exception to the warrant requirement. This doctrine also had extensive examina-

tion by this Court in Coolidge, wherein the following introductory approach to this exception was made:

> "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance other than being simply the normal concomitant of any search, legal or illegal." 91 S. Ct. 2022, 2037.

In the same case, the Supreme Court made the following remarks concerning the doctrine:

> "(23-25) The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless search of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search and seizure absent 'exigent circumstances'. Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even

> where the object is contraband, this Court has repeatedly stated and enforced the basic principle that the police may not enter and make a warrantless seizure." (citing many cases) See 91 S. Ct. 2022, 2039.

From the words of Deputy Crum's own mouth, after waiting three days without obtaining a warrant based on tipster information, he himself "lay in wait" for the defendant to get into his own vehicle and then effected a stop of the automobile to look inside for what he was certain that he would find. The conclusion is inescapable that the peace officer knew in advance the location of the evidence and intended to seize it from the beginning of his stake-out. Again, this Court's opinion in Coolidge deals with this precise situation, as shown by the following excerpt:

> "(26-27) The second limitation is that the discovery of evidence in plain view must be inadvertent. The rationale, as just stated, is that a plain view seizure will not turn an intiially valid (and therefore limited) search

> into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances'." See 91 S. Ct. 2022, 2040.

In footnote 27 of the same case, page 2041, we find the following amplification of the Court's view as to the doctrine under consideration:

> ". . . . . .this Court has never permitted the legitimation of a planned warrantless seizure on plain view grounds. . . . . and to do so here would be flatly inconsistent with the existing body of Fourth Amendment law . . . . . " 91 S. Ct. 2022, 2041. (Emphisis supplied).

Most importantly, the plain view doctrine in warrantless automobile search cases not only requires that a valid automobile exception be present (which is not the case here), it also has the require-

ment of "exigent circumstances" to justify an invoking of the exception on the part of the prosecution.

As pointed out in the earlier part of this argument, "exigent circumstances" as described in the cases cited hereinabove, are simply absent from the facts of this case. A peace officer waited three days on a stale tip to lay in wait for the defendant to get in his own vehicle to return home and then asserts that the defendant's vehicle thus provides the talisman to execute a warrantless search. We submit that such a result is contrary to the Fourth Amendment and to the pronouncements of this Court in numerous cases based on similar facts.

CONCLUSION

For the reasons set forth, it is respectfully sibmitted that this peti-

tion for Writ of Certiorari should be granted.

Respectfully submitted,

ELLIS& ELLIS

CAREY J. ELLIS, JR.
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Dec. 1, 1982

SUPREME COURT OF LOUISIANA

NO. 82-KA-0356

STATE OF LOUISIANA

V.

DAVID KLINE

Appeal from the 5th Judicial District
Court, Parish of Franklin,
Honorable Sonny N. Stephens, Judge.

PER CURIAM

Affirmed.

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

NEWS RELEASE #1

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On January 7, 1983, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Assoicate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

. . . . . .

. . . . . .

82-KA-0858 State v. David Kline
Calogero, J., would grant a rehearing.

. . . . . .

. . . . . .

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS FILED:Jan. 17, 1983

DAVID KLINE

APPLICATION AND ORDER
FOR STAY OF EXECUTION

UPON MOTION of DAVID KLINE, defendant-appellant in the above styled and numbered cause, through his undersigned counsel, and on suggesting to this Honorable Court that its decree of December 1, 1982 affirming the verdict and sentence of the Fifth District Court in and for the Parish of Franklin is now final, this Court having refused an Application for Rehearing on January 7, 1983 and on further suggesting that the defendant is desirous of applying to the Supreme Court of the United State for a Writ of Certiorari to review the decision of this Honorable Court upon the Constitutional issue raised in said cause and as shown

by the record of the same:

IT IS ORDERED That petitioner, DAVID KLINE, be granted a Stay of Execution of the Decree of this Honorable Court for a period of 60 days from this date.

DONE AND SIGNED In Chambers on this the 17th day of January, 1983.

New Orleans, Louisiana s/ John A. Dixon
JUSTICE

/s/ Carey J. Ellis, Jr.
CAREY J. ELLIS, JR.
Counsel for Defendant-Petitioner
Rayville, Louisiana

January 13, 1983.

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